Not To Be Published

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

SUSAN M. KNUDSEN, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4108-MWB **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DEFENDANT'S OBJECTIONS TO REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Susan M. Knudsen ("Knudsen") seeks judicial review of the final decision of the Commissioner of Social Security denying her application for a period of disability or disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss recommended judgment be entered in favor of Knudsen and against the Commissioner. Report and Recommendation, Doc. No. 18. Judge Zoss recommends that Knudsen be awarded benefits from September 1, 1998, through April 24, 2002, the date of the ALJ's decision. The Commissioner filed objections to the Report and Recommendation. (Doc. No. 19).

II. BACKGROUND

Knudsen filed her application on October 23, 2000. She alleges disability due to a combination of physical and mental impairments, which include fibromyalgia, Raynauds[1], irritable bowel syndrome, and a bipolar disorder. (R. at 107). At the time of the hearing, Knudsen was 46 years old. She stated at the hearing before the ALJ that she was 5'1 1/2" tall and weighed 110 pounds. (R. at 27-28). Knudsen's application was denied on January 30, 2001 (R. at 68, 70-73), and denied again upon reconsideration, on May 31, 2001. (R. at 69, 75-78). On June 5, 2001, Knudsen filed a timely request for hearing before an ALJ. (R. at 79). A hearing was held on December 14, 2001. (R. at 24-

[1] Raynaud's disease; symmetric asphyxia; idiopathic paroxysmal bilateral cyanosis of the digits due to arterial and arteriolar contraction; caused by cold or emotion. *Stedman's Medical Dictionary* 1535 (25th ed.).

67). On April 4, 2002, Knudsen's claim was denied by the ALJ. (R. at 10-22). Knudsen filed a request for review by the Appeals Council. On October 4, 2002, the Council denied Knudsen's request for review, making the ALJ's decision the final decision of the Commissioner. (R. at 5-6). Knudsen filed a timely request for review in this court on November 18, 2002. Knudsen filed a brief supporting her claim on May 15, 2003. (Doc. No. 12). On July 7, 2003, the Commissioner filed her response brief. (Doc. No. 16). On December 16, 2003, Judge Zoss issued his Report and Recommendation finding that Knudsen was disabled from September 1, 1998, through April 24, 2002, the date of the ALJ's decision. (Doc. No. 18). On January 2, 2004, the Commissioner filed her objections to the Report and Recommendation. (Doc. No. 19). On January 9, 2004, Knudsen filed her motion to strike the Commissioner's objections as untimely. (Doc. No. 20). On January 28, 2004, the court denied Knudsen's motion to strike. (Doc. No. 21). The court waited to see if Knudsen would file an additional reply to the Commissioner's objections. The court has received no additional reply and finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it

is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)). The Commissioner has made specific, timely objections in this case. Therefore, *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is required here. *See* 28 U.S.C. § 636(b)(1).

The standard of judicial review for cases involving the denial of social security benefits is based on 42 U.S.C. § 405(g), which provides that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." This standard of review was explained by the Eighth Circuit Court of Appeals as follows:

> Our standard of review is narrow. "We will affirm the ALJ's findings if supported by substantial evidence on the record as a whole." *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision." *Id*. If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the court must affirm the Commissioner's decision.

See Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

The Eighth Circuit Court of Appeals also has explained, "In reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ's decision." *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir.

2001) ("In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner's decision as well as evidence that supports it.") (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted). Accordingly, in reviewing the record in this case, the court must determine whether substantial evidence on the record as a whole supports the ALJ's decision that Knudsen is not disabled.

B. The Commissioner's Objections

The Commissioner objects to Judge Zoss's conclusion that the ALJ failed to provide legally sufficient reasons for not giving controlling weight to the opinion of Knudsen's treating physician, Dr. Dean. The Commissioner also objects to Judge Zoss's analysis of the ALJ's treatment of licensed independent social worker, Ms. Conner. Finally, as in almost every case, the Commissioner objects to Judge Zoss's analysis regarding the burden of proof at step five of the sequential evaluation process.

C. Discussion

As stated above, a district court's standard of review is narrow and the court will affirm an ALJ's findings if the findings are supported by substantial evidence on the record as a whole. *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). "Substantial evidence is less than a preponderance, but enough so that a reasonable mind might find it adequate to support the conclusion." *Johnson v. Apfel*, 240 F.3d 1145, 1147 (8th Cir. 2001). After a district court reviews the record, if the court finds that it is "possible to draw two inconsistent positions from the evidence and one of those positions represents the

Commissioner's findings, the court must affirm the Commissioner's decision." *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000).

1. Treating Source

The Commissioner contends that contrary to Judge Zoss's Report and Recommendation, the ALJ stated legally sufficient reasons for giving "great" but not controlling weight to the February 9, 2001 opinion of Dr. Dean. The Commissioner argues that Dr. Dean's 2001 opinion was inconsistent with an earlier opinion from 2000. Opinions from treating sources are to be afforded greater weight than non-treating sources. 20 C.F.R. § 404.1527(d). The regulations state that if a treating source's opinion regarding the "nature and severity" of the impairment is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the case, the treating source's opinion will be given "controlling weight." *Id.* § 404.1527(d)(2).

Dr. Dean is an examining physician who is also a treating source. In January 1999, Dr. Dean began treating Knudsen. The Commissioner acknowledges that a treating source's opinion is ordinarily entitled to substantial weight. However, the Commissioner argues that Dr. Dean's opinion is, itself, inconsistent and therefore, the ALJ properly gave little weight to his opinion. Specifically, the Commissioner argues that Dr. Dean's opinion from December 2000 is inconsistent with Dr. Dean's opinion given in February 2001. The February 2001 opinion is actually a disability form completed and signed by both Dr. Dean and Ms. Conner, Knudsen's treating therapist. This court reviews, not only the two opinions in question from Dr. Dean, but all of the opinions expressed by Dr. Dean in the medical notes signed exclusively by Dr. Dean, with the exception of the February 2001 opinion. On January 18, 1999, Dr. Dean's intake notes included the following:

> [O]n two occasions in 1998 she had episodes where she

> became very suspicious with a great deal of psychomotor agitation, expanded mood, and decreased need for sleep. Both of these occasions necessitated acute inpatient psychiatric hospitalizations that resulted in her being placed on mood stabilizers, initially Depakote, however, she lost her hair and most recently Lithium.

(R. at 332). Dr. Dean's diagnostic impression was:

> Bipolar I Disorder with Psychosis in Partial Remission.
> Fibromyalgia and Raynauds disease.
> Significant medical, work, financial and family problems.

(R. at 333). Dr. Dean also noted:

> She is willing, however, to participate in an aggressive treatment program that includes the ongoing use of both the Lithium, Seroquel, and potentially the Lorazepam . . . We talked about the genetic predisposition to be in other family members, not just Bipolar Disorder but other mental illnesses. She talked about her desire to continue to be part of society despite this illness and how that could happen. She continues to see Judy Conner, her therapist, and I will see the patient back in a couple of months.

(R. at 334). On March 22, 1999, Dr. Dean noted:

> She is taking Seroquel, Ativan, Lithium and has been evaluated by Dr. Lanferman, her family physician, because of an assortment of medical problems . . . I chatted for some time with she and her husband over the diagnosis of Bipolar Disorder, what she can anticipate from now on in her life, and how this may affect her level of functioning. She is seeing a therapist and I think that is a very good thing for her.

(R. at 323). On June 24, 1999, Dr. Dean noted that Knudsen was doing "reasonably well" and that she was taking her medications as prescribed. (R. at 314). Dr. Dean wanted her to continue taking Lithobid, Ativan and Seroquel and to continue with her outpatient supportive counseling. (R. at 314). On October 15, 1999, Dr. Dean referred Knudsen to

the Siouxland Mental Health Center because she expressed her interest in joining a Biopolar Support Group. (R. at 305). At that time, Knudsen was directed to continue seeing her therapist on a fairly regular basis and she was taking Lithobid, Seroquel and Ativan. (R. at 305). On February 24, 2000, Dr. Dean noted that Knudsen was complaining about excessive sedation and fatigue and that this was probably related to the Seroquel. (R. at 296). Knudsen was also experiencing tremors. (R. at 296). On June 9, 2000, Dr. Dean noted that Knudsen asked how long she would need to be on medications, in response Dr. Dean stated, "it is clear that in the past when we have tried to reduce her medications she has become hypomanic and mildly paranoid." (R. at 290). At this time, Dr. Dean's medical notes also included the following:

> She is on a combination of Seroquel and Lithobid with low dose of Ativan. She does pretty well in terms of her general level of functioning, but she has to be on the medication and if she really pushes herself and then she can decompensate pretty easily. But as long as she doesn't push herself too much, takes her medicines regularly and makes sure she eats and sleeps she actually is pretty comfortable. She certainly is not suicidal or homicidal and no psychotic symptoms at this time.

(R. at 290). On October 2, 2000, Dr. Dean saw Knudsen and noted that conflicts are "always fairly stressful to the patient" and that "she is easily overwhelmed when there are some significant changes in her environment." (R. at 285). On December 8, 2000, Dr. Dean wrote a letter to the Disability Determination Services:

> Ms. Knudsen carries a diagnosis of Bipolar I Disorder, Mixed Type, with Psychosis, in Full Remission. The patient actually had her acute psychotic episode that resulted in her hospitalization in 1998 prior to my ever seeing the patient. The first time I met her was in January of 1999. Her Bipolar diagnosis manifests itself with a combination of mania;

> expansive mood, flight of ideas, pressured speech and delusional thoughts with auditory hallucinations and paranoia.
> . . .
> She does maintain a history, at least over the past two years, which reflects attempts to become involved in fairly structured work-like setting, i.e. 8 hour days, 40 hour weeks, resulting in fairly abrupt decompensation leading to a return of both manic and psychotic symptoms.
> . . .
> She has some difficulties maintaining attention, concentration and pace because while most of her symptoms are in remission, she does have episodes where there are a lot of thoughts in her mind and "flight of ideas."

(R. at 284). On February 9, 2001, Dr. Dean and Ms. Conner completed and signed a form for Disability Determination Services. On the form, Dr. Dean and Ms. Conner indicated that Knudsen had "some loss of ability" and "substantial loss of ability" regarding her ability to perform certain activities in the work place. (R. at 367). It was noted that her condition existed and persisted with the restrictions outlined on the form since September 1998. (R. at 368). Dr. Dean and Ms. Conner indicated that her restrictions of daily living were moderate but that her deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere) was "often." It was also noted that Knudsen had repeated "past episodes of deterioration or decompensation in work or work-like settings." (R. at 370).

The Commissioner acknowledges that a treating source's opinion is ordinarily entitled to substantial weight. The Commissioner asserts that the ALJ's decision to give less weight to Dr. Dean's opinion because his December 2000 opinion is inconsistent with his February 2001, is supported by the evidence. The court will now consider the ALJ's conclusion as to Dr. Dean's opinions. The ALJ stated in his decision:

> The opinion of Dr. Dean, the claimant's treating psychiatrist,

> regarding the claimant's mental functional ability is given great weight but the report appears to contain inconsistencies, and the doctor's opinion is accordingly rendered less persuasive. His remarks in February 2001 that she has moderate restrictions of activities of daily living and maintaining social functioning, often has deficiencies of concentration, persistence and pace and that she has experienced repeated episodes of deterioration or decompensation, all appear relevant to her symptoms in 1998 and immediately thereafter. However, there is no evidence that she has experienced any periods of decompensation within the past twelve months. In fact, Dr. Dean also reported in December 2000 that most of her symptoms were in remission. The possibility always exists that a doctor may express an opinion in an effort to assist a patient with whom he or she sympathizes for one reason or another.

(R. at 19). First, the court finds no inconsistencies between the two opinions, or any of the opinions, given by Dr. Dean. Second, the ALJ infers that it was Dr. Dean that reported there was no evidence that Knudsen experienced any periods of decompensation in the past twelve months. This is an inaccurate reflection of the record. In fact, Dr. Dean indicated that Knudsen had repeated "episodes of deterioration or decompensation in work and work-like settings which caused her to withdraw from the situation or to experience exacerbation of signs and symptoms." (R. at 370). Further, Dr. Dean reported Knudsen "does maintain a history, at least over the past two years, which reflects attempts to become involved in fairly structured work-like setting, i.e. 8 hour days, 40 hour weeks, resulting in fairly abrupt decompensation leading to a return of both manic and psychotic symptoms." (R. at 284). Third, the conclusion that Knudsen has only "moderate restrictions of activities of daily living and maintaining social functioning" does not support a finding that she is able to work when she has "a substantial loss of ability to maintain attention for extended period of two hour segments, to work in coordination with or in

proximity to others without being distracted by them, or to make simple work-related decisions." (R. at 367).

This court has reviewed Dr. Dean's opinions and rejects the Commissioner's contention that Dr. Dean's opinions from December 2000 and February 2001 are inconsistent. Dr. Dean's opinions consistently describe Knudsen as an individual who has "substantial loss of ability" to perform activities in the work place. Additionally, Dr. Dean's opinions support a finding that when she is placed in a work environment she experiences decompensation. Further, there is substantial evidence in the record as a whole to support Dr. Dean's opinions as documented in Judge Zoss's Report and Recommendation. Report and Recommendation, Doc. No. 18 at 39-42.

The court also observes that the Commissioner states, "Interestingly, she also did not testify that she had experienced any episodes of decompensation or deterioration at any time between February 2001 and the date of the hearing, December 14, 2001." The court wonders why this is so "interesting" since her episodes of decompensation or deterioration occur when she is placed in a work environment. Knudsen was not in a work environment during this time period. In fact, the ALJ found that Knudsen had not engaged in any substantial gainful activity since her onset date. (R. 14). Logically, if the work environment causes her episodes of decompensation and deterioration then, of course, she would not have "any episodes" if she was not working.

The court finds that the ALJ erred in not giving controlling weight to Dr. Dean, who was not only an examining medical source but also a treating source. Therefore, as to this issue, the Commissioner's objection is overruled.

2. Acceptable Source

The Commissioner argues that it was improper for Judge Zoss to give the opinion of Ms. Conner, who is an "acceptable source" but not an "acceptable medical source,"

more weight than the state agency psychological consultant, an "acceptable medical source," who had not examined her. The Commissioner asserts that "neither the regulations nor the case law provide a basis for the Magistrate Judge's conclusion that any opinion from Ms. Conner was entitled to greater weight than that of the non-examining state agency psychological consultant."

It is true that the regulations distinguish between an "acceptable medical source" and an "acceptable source." *See* 20 C.F.R. §§ 404.1513(a), 416.913(a). The regulation expressly states:

> We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s). See § 404.1508. Acceptable medical sources are–
> (1) Licensed physicians (medical or osteopathic doctors);
> (2) Licensed or certified psychologists. Included are school psychologists, or other licensed or certified individuals with other titles who perform the same function as a school psychologist in a school setting, for purposes of establishing mental retardation, learning disabilities, and borderline intellectual functioning only;
> (3) Licensed optometrists, for the measurement of visual acuity and visual fields (we may need a report from a physician to determine other aspects of eye diseases);
> (4) Licensed podiatrists, for purposes of establishing impairments of the foot, or foot and ankle only, depending on whether the State in which the podiatrist practices permits the practice of podiatry on the foot only, or the foot and ankle; and
> (5) Qualified speech-language pathologists, for purposes of establishing speech or language impairments only. For this source, "qualified" means that the speech-language pathologist must be licensed by the State professional licensing agency, or be fully certified by the State education agency in the State in which he or she practices, or hold a Certificate of Clinical Competence from the American Speech-Language-Hearing

Association.

Id.[2] As a counselor and not a licensed or certified physician or psychologist, Ms. Conner, acting alone, is not an "acceptable medical source" whose testimony must be afforded substantial weight by the ALJ. *See Barnett v. Apfel*, 231 F.3d 687, 689 (10th Cir. 2000); *Hartranft v. Apfel*, 181 F.3d 358, 361-62 (3d Cir. 1999); *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 530 (6th Cir. 1997); *Diaz v. Shalala*, 59 F.3d 307, 313 (2d Cir. 1995); *Bird v. Apfel*, 43 F. Supp.2d 1286, 1291 (D. Utah 1999) (social workers' opinions are not given great weight because they are not included in the list of "acceptable medical sources"). The ALJ stated the following regarding the medical progress notes containing Ms. Conner's and Dr. Dean's signatures:

> The opinion of social worker Judy Conner regarding the claimant's mental ability to work is given due consideration. However, the undersigned notes that the professional opinions of such individuals, while contributory to the sum of medical evidence, are deemed *insufficient alone* to establish the existence of disability within the meaning of the Act. Inasmuch as a social worker/etc. is not a competent medical professional, within the meaning of Social Security law and regulations, the undersigned gives Ms. Conner's opinion regarding the claimant's mental functional capacity little

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[2] Until June 1, 2000 the regulation included the language "report of an interdisciplinary team that contains the evaluation and signature of an acceptable medical source" to defined an acceptable medical source. This language was changed because the language was considered to be redundant. The explanation for removing this language was:

> acceptable medical sources are individuals, it is redundant and somewhat misleading to provide that an interdisciplinary team report containing the evaluation and signature of an acceptable medical source is such a source.

2000 WL 699473 (F.R.).

weight.

(R. at 19) (emphasis added). The court observes, however, that Ms. Conner was not acting alone in her treatment of Knudsen. *See Nichols v. Commissioner of Social Security*, 260 F. Supp. 2d 1057 (D. Kansas 2003) (determining that standing alone a nurse practitioner's notes were not an acceptable medical source because no evidence indicated she was working closely under the supervision of a doctor or that doctor had ever seen or treated claimant). In the initial intake form with Dean and Associates, Dr. Dean indicated that Knudsen would receive counseling from one of the "staff psychotherapists, Judy Conner here in the office" and that she "continues to see Judy Conner, her therapist." (R. at 332, 334). The progress notes indicate that not only was Ms. Conner's signature on each treatment and evaluation session of Knudsen, but Dr. Dean's signature also appears—with an indication that he has reviewed and approved Ms. Conner's findings and treatment. (R. at 286-289, 291-295, 297-304, 306-313, 315-322, 324-331, 335-337). In the progress notes it is apparent that Ms. Conner saw Knudsen for therapy in conjunction with and under the supervision of Dr. Dean, who monitored both Knudsen's medication regiment and her mental health condition. Ms. Conner directed Knudsen to discuss with Dr. Dean her medication, emotional status, and emergency treatment. (R. at 324-326). Ms. Conner indicated that, "I told Ed [Knudsen's husband] that I really wanted him to attend Susan's next appointment with Dr. Dean because some of the questions he had were more medically based and I felt Dr. Dean could answer those more completely than I could." (R. at 335). Further, the progress notes include, "Susan will continue to see Dr. Dean for medication. Told Susan that I want her to monitor her emotional and mental state very closely letting me or Dr. Dean know if she is feeling at all like the Bipolar symptoms are returning." (R. at 337). When Disability Determination Services' psychological consultant had a question regarding one of Dr. Dean's statements and Dr. Dean was not

available he contacted "the treating social worker in order to inquire as to whether she could provide information regarding his statement in the letter." (R. at 338). Ms. Conner did clarify Dr. Dean's statement. Ms. Conner and Dr. Dean both personally examined Knudsen several times between 1999 and 2001. Ms. Conner worked closely under the supervision of Dr. Dean as a "staff psychotherapist" of Dean and Associates, thus, she acted as an agent of Dr. Dean during her relationship with Knudsen. The court concurs with Judge Zoss's conclusion that the information contained in the progress notes was not properly considered. The progress notes represented not only Ms. Conner's opinion but also Dr. Dean's opinion since he, as the leader of Knudsen's treatment team, reviewed and approved the progress notes. The "opinions" expressed in the progress notes are not exclusively Ms. Conner's opinion as an "other acceptable source" but arguably part of the opinion of Dr. Dean, who included the progress notes signed by both Ms. Conner and himself when he submitted his records to Disability Determination Services. (R. at 283). The court notes that the regulations at one time defined "acceptable medical sources as a 'report of an interdisciplinary team that contains the evaluation and signature of an acceptable medical source.'" This language was changed because the language was considered to be redundant since an interdisciplinary team report containing the evaluation and signature of an acceptable medical source is an "acceptable medical source." The court views the progress notes from Dean and Associates as those of an interdisciplinary team containing the evaluation and signature of an acceptable medical source. Ms. Conner worked for Dean and Associates, Dr. Dean referred to her as one of the "staff psychotherapists," all progress notes were reviewed and approved and signed by Dr. Dean. Dean and Associates, specifically Ms. Conner and Dr. Dean, treated Knudsen from January 1999 to October 2000, often on a weekly basis. The progress notes do not represent statements signed exclusively by a social worker or a one time opinion signed

by a social worker and non-treating medical source, the notes represent months of treatment, consultations and monitoring signed by both a licensed social worker and a medical source.

Further, the progress notes reflect Ms. Conner's and Dr. Dean's judgments about the nature and severity of Knudsen's impairments, her symptoms, diagnosis and prognosis, and what Knudsen could do despite her impairments and her mental restrictions. *See* 20 C.F.R. § 416.927(a)(2). It is apparent to the court that Ms. Conner and Dr. Dean worked closely together when treating Knudsen. The court acknowledges that the progress notes must contain more than just the signature of a medical source. *See Nichols v. Commissioner of Social Security*, 260 F. Supp. 2d 1057 (D. Kansas 2003) (finding that the mere co-signing of the report does not create an interdisciplinary team within the meaning of the regulation). In this case, the Commissioner argues that the court should consider the progress notes signed by both Ms. Conner and Dr. Dean as separate from the progress notes signed exclusively by Dr. Dean. The court does not agree. Knudsen's progress notes from Dean and Associates should be viewed as one source of evidence from an "acceptable medical source." Knudsen was a patient of Dean and Associates. She was under the care of an interdisciplinary team comprised of Dr. Dean and Ms. Conner. As part of her treatment she was directed by Dr. Dean to see Ms. Conner. In addition, unlike the Disability Services Determination examiners, Ms. Conner and Dr. Dean were treating sources that had been treating Knudsen for more than one year, which arguably places them in a better position to evaluate Knudsen's day-to-day condition than that of an "acceptable medical source" who was a non-examining source, without a long-term relationship. *See Ribar v. Barnhart*, 199 F. Supp.2d 917 (S.D. Iowa 2002) (finding that a social worker, who had been treating claimant for more than one year, was in a better

position to evaluate condition than "acceptable medical sources" that did not have treating relationship and that her opinion should have been considered when establishing RFC).

Judge Zoss determined that Ms. Conner's opinion was that of an "other medical source" that should be given more weight because she had an "examining relationship" with Knudsen. As explained above, this court has determined that the progress notes signed by both Ms. Conner and Dr. Dean are an "acceptable medical source" because the progress notes are contemporaneous assessments of Knudsen's condition that contain the evaluation and signature of an "acceptable medical source", Dr. Dean, who was the team leader in treating Knudsen. The court disagrees with the Commissioner that neither the regulations nor the case law provide a basis for Judge Zoss's conclusion that the progress notes signed by Ms. Conner and Dr. Dean are entitled to greater weight than that of the non-examining state agency psychological consultant who had no treating relationship with Knudsen. The ALJ erred in failing to give great weight to this opinion evidence. Therefore, the Commissioner's objection, as to this issue, is overruled.

3. Burden of Proof

The Commissioner objects to the Judge Zoss's discussion regarding the Commissioner's burden of proof at step five of the sequential evaluation process. Recently, the Eighth Circuit Court of Appeals addressed this issue. On January 30, 2004, the Eighth Circuit Court of Appeals stated that the case law, as to the Commissioner's burden at step five, is inconsistent, stating:

> Our cases are inconsistent on where the burden of persuasion lies during step five of the Commissioner's process. *Compare Young v. Apfel*, 221 F.3d 1065, 1069 n. 5 (8th Cir. 2000) ("burden of production" shifts to Commissioner, but "burden of persuasion" remains with claimant) and *Roth v. Shalala*, 45 F.3d 279, 282 (8th Cir. 1995) (same) with *Griffon v. Bowen*, 856 F.2d 1150, 1153-54 (8th Cir. 1988) ("burden of

> persuasion" shifts to Secretary). *See also, e.g., Bowen v. Yuckert*, 482 U.S. at 146 n. 5, 107 S.Ct. 2287 ("the Secretary bears the burden of proof at step five"); *Singh v. Apfel*, 222 F.3d 448, 451 (8th Cir. 2000) (stating that "burden of proof" shifts to Commissioner, without specifying burden of "production" or "persuasion"); *James, Burdens of Proof*, 47 Va. L.Rev. 51, 51 (1961) ("burden of proof" is used in our law to refer to "two separate and quite different concepts": the burden of persuasion and the burden of production) (*quoted in Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 633 n. 22 (8th Cir.1978), rev'd on other grounds, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979)). The Commissioner recently promulgated a new rule designed to clarify that although a burden of production shifts to the Commissioner at step five, the ultimate burden of persuasion remains with the claimant. 68 Fed.Reg. 51153, 51155 (Aug. 26, 2003). We need not opine regarding the location of the burden of persuasion prior to the new rule, because we conclude that even if the Commissioner bore that burden at step five, there is substantial evidence to support her decision.

Harris v. Barnhart, 356 F.3d 926, 931 n. 2 (8th Cir. 2004). The Commissioner's recently promulgated rule states in pertinent part:

> We are changing several sections in subpart P of part 404 and subpart I of part 416 to clarify our longstanding rules about how we make determinations and decisions for initial applications at steps 4 and 5 of the sequential evaluation process. The changes will also apply to steps 7 and 8 of the sequential evaluation processes for determining continuing disability in § 404.1594(f), and steps 6 and 7 in § 416.994(b)(5). However, for clarity we will refer in this preamble only to the steps of the sequential evaluation process for initial applications. Several of the revisions clarify our longstanding interpretation of our rules that we assess your RFC once, after we have found that you have a severe impairment(s) that does not meet or equal a listing; i.e., after

step 3 but before we consider step 4. We use this RFC assessment first to determine, at step 4, whether you are able to do any of your past relevant work. If we determine that you cannot perform your past relevant work, or you have no past relevant work, we use the same RFC assessment at step 5 to determine whether you are able to make an adjustment to other work, given your RFC, age, education, and work experience. Under the Act and §§ 404.1512 and 416.912 of our regulations, you generally have the burden of proving your disability. You must furnish medical and other evidence we can use to reach conclusions about your impairment(s) and its effect on your ability to work on a sustained basis. Our responsibility is to make every reasonable effort to develop your complete medical history. That includes arranging for consultative examinations, if necessary, and making every reasonable effort to get medical reports from your own medical sources. We are responsible for helping you produce evidence that shows whether you are disabled. Our administrative process was designed to be nonadversarial. (See §§ 404.900(b) and 416.1400(b) of our regulations; *Richardson v. Perales*, 402 U.S. 389, 403 (1971); *Sims v. Apfel*, 120 S. Ct. 2080, 2083-85, 2086 (2000).) In addressing burdens of proof, it is critical to keep in mind that we are using a term in our nonadversarial administrative process that describes a process normally used in adversarial litigation. **"Burdens of proof" operate differently in the disability determination process than in a traditional lawsuit. In the administrative process, the burden of proof generally encompasses both a burden of production of evidence and a burden of persuasion about what the evidence shows.** (*Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 273 (1994) (citing *Powers v. Russell*, 30 Mass. 69, 76 (1833).) **You shoulder the dual burdens of production and persuasion through step 4 of the sequential evaluation process.** (*See Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).) Although you generally bear the burden of proving disability throughout the sequential evaluation process, **there is a limited shift in**

> **the burden of proof to us "only if the sequential evaluation process proceeds to the fifth step * * *."** *Bowen v. Yuckert, id.* When the process proceeds to the fifth step, this means that you have demonstrated the existence of a severe impairment(s) resulting in an RFC that prevents the performance of past relevant work. When we decide that you are not disabled at step 5, this means that we have determined that there is other work you can do. To make this finding, we must provide evidence that demonstrates that jobs exist in significant numbers in the national economy that you can do, given your RFC, age, education, and work experience. **In legal terms, this is a burden of production of evidence. This burden shifts to us because, once you establish that you are unable to do any past relevant work, it would be unreasonable to require you to produce vocational evidence showing that there are no jobs in the national economy that you can perform, given your RFC.** However, as stated by the Supreme Court, "It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so." *Bowen v. Yuckert*, *id.* Thus, the only burden shift that occurs at step 5 is that we are required to prove that there is other work that you can do, given your RFC, age, education, and work experience. That shift does not place on us the burden of proving RFC. **When the burden of production of evidence shifts to us at step 5**, our role is to obtain evidence to assist in impartially determining whether there is a significant number of jobs in the national economy you can do. **Thus, we have a burden of proof even though our primary interest in the outcome of the claim is that it be decided correctly.** As required by the Act, the ultimate burden of persuasion to prove disability, however, remains with you.

68 Fed. Reg 51153, 51155 (Aug. 26, 2003).

This court has reviewed Judge Zoss's discussion regarding the Commissioner's burden at step five. *See* Report and Recommendation, Doc. No. 18 at 35-36. The court

finds it is unnecessary to repeat Judge Zoss's discussion here. The court has compared Judge Zoss's discussion with the Commissioner's clarification, the court finds that Judge Zoss's language is consistent with the Commissioner's own language. *See* 68 Fed. Reg 51153, 51155-51156 (Aug. 26, 2003). Therefore, the Commissioner's objection, as to this issue, is overruled.

IV. CONCLUSION

Upon *de novo* determination of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which the Commissioner has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that the Commissioner's objections must be **overruled**. Therefore, the Report and Recommendation concerning disposition of this matter is **accepted**. *see* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].")— **judgment shall enter in favor of Knudsen** for a period of disability from September 1, 1998, through April 24, 2002, the date of the ALJ's decision and against the Commissioner in this action.

IT IS SO ORDERED.

DATED this 30th day of March, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA